SUPREME COURT, U.S.
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No. 525 IN THE SUPREME COURT OF THE UNITED STATES

ERMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GULCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased, DOROTHY E. SWARTZ, Administratrix of the Estate of HAROLD SWARTZ, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

FRED ROLAND ALLABEN,
408 Federal Square Building,
Grand Rapids 2, Michigan.
(Counsel of Record).

CRAIG E. DAVIDS,
408 Federal Square Building,
Grand Rapids 2, Michigan.
Attorneys for Petitioners, Clare Goodman, Forrest M. E. Johnson, Anna Gulch, Adm'x of the Estate of Stephen Stanley Gulch, Deceased, Dorothy E. Swartz, Adm'x of the Estate of Harold Swartz, Deceased.

HARRY D. REBER,
Fremont, Michigan,
Attorney for Petitioners, Erma F. Springer and Murl D. Springer.

RICHARD B. BAXTER,
216 Federal Square Building,
Grand Rapids 2, Michigan.
Attorney for Petitioner, Indiana Lumbermen's Mutual Insurance Company.

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W.
GRAND RAPIDS 2, MICHIGAN — PHONE GL 8-5326

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IN THE

SUPREME COURT OF THE UNITED STATES

ERMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GULCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased, DOROTHY E. SWARTZ, Administratrix of the Estate of HAROLD SWARTZ, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners herein include the widows (as personal representatives) of men killed, and two men seriously injured, in an automobile collision. They hereby pray that a writ of certiorari issue to review the judgment entered against them in the United States Court of Appeals for the Sixth Circuit on August 28, 1959. The Opinion upon which this judgment is based is dated August 28, 1959, and reported as Case No. 13,594 in 269 F. 2d 805. Copy of the Opinion is appended.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed is dated and was entered August 28, 1959.

An order denying rehearing was dated October 7, 1959. An order staying proceedings for 30 days within which to

petition for certiorari was dated and entered October 19, 1959. It further provided, "that if application for writ of certiorari is filed in the Supreme Court within said thirty days then the stay shall operate until the final disposition of the case by the Supreme Court."

To sustain the jurisdiction of this Court and have writ of certiorari granted, petitioners rely upon 28 *U. S. C. A.*, Section 1254, and the provisions of Amendment VII to the United States Constitution, which preserves to petitioners the right to trial by jury.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in applying the federal test as to sufficiency of evidence, instead of the Michigan rule requiring any evidence, "however slight", to be submitted to the jury, in determining issues of fact in a diversity of citizenship case?

2. Can the Court of Appeals, contrary to the holdings of the Supreme Court, deny petitioners a trial by jury where there is sufficient evidence in the record consistent with the jury's finding that answers to questions in an application for automobile insurance were true and that there was no rescission of said insurance policy, and where the trial judge refused to set aside the verdict of the jury?

3. Did the Court of Appeals err in holding that the judgment of the District Court should be reversed for alleged error in submitting to the jury three special interrogatories where appellant-insurance company's counsel did not object on the record to submission of such special interrogatories, as required by Rule 51 of the Federal District Court Rules of Civil Procedure?

CONSTITUTIONAL PROVISIONS AND COURT RULES

The constitutional provision involved is Amendment VII, found in *U. S. C. A.*, Constitution, page 379, viz.:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a

jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Federal District Court Rule 51 involved is found in 28 *U. S. C. A.*, Rules, pages 511-12, viz.:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the request prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

CONCISE STATEMENT OF THE CASE

Two men were killed and two others seriously injured when an automobile operated by Murl D. Springer ran a red traffic signal and stop sign and collided with a vehicle driven by Harold Swartz on November 13, 1955 (11a and 12a). The killed and injured were all occupants of the Swartz vehicle. They or their widows, as personal representatives, are the principal petitioners herein (11a and 12a). The Springer automobile had been insured for nearly two years preceding the accident (since April 2, 1954) by policy of the Allstate Insurance Company, Respondent herein, providing for public liability protection with limitations of $10,000 for injury to any one person and $40,000 to four or more persons in any one accident (317a).

Subsequent to the fatal accident, the Respondent Insurance company instituted a Declaratory Judgment action in the United States District Court for the Western District of Michigan against its insured, Erma F. Springer, owner of the death vehicle, and her husband, Murl D. Springer,

driver, as well as the petitioners herein, seeking a declaration of rights to void said policy and avoid liability thereunder (6a-16a). Jurisdiction of the District Court was invoked on the basis of diversity of citizenship and the amount in controversy (6a). Respondent insurance company claimed that the policy was void from its inception by reason of allegedly false answers to questions 6 and 7 in the original policy application (13a). Petitioners herein and the insured owner and operator of the death vehicle claim that the questions were answered truthfully (234a).

The insurance company further claims that the policy was rescinded *after* the fatal accident by a letter to Erma F. Springer enclosing a check for the premiums (32a). Petitioners claim the amount was insufficient (44b). The letter was opened by *Mr.* Springer and the check cashed by him *without* Mrs. Springer's knowledge (240a). Mr. Springer in fact forged her signature (240a). Mrs. Springer never saw the check until the trial of this case. She never read the letter of alleged rescission (252a).

In accordance with the answers of the jury to the three special interrogatories submitted (294a-295a), the United States District Court, Hon. Raymond W. Starr, entered on April 10, 1957, a judgment declaring the policy valid from its inception and in full force and effect as of the date of the accident (296a-297a). The Trial Judge, a former Justice of the Michigan Supreme Court, is an eminent Federal trial jurist of many years' experience, without prior reversal of his decisions. After giving this case meticulous study and attention, he denied respondent insurance company's motions for a new trial and judgment for respondent (300a-314a).

The Circuit Court of Appeals reversed the case.

ARGUMENT

SUFFICIENCY OF EVIDENCE TEST

The Court of Appeals in setting aside the jury's findings as to the three special interrogatories, obviously adopted the Federal test on sufficiency of evidence. The opinion stated:

> "We are of the opinion that a review of the evidence in the light most favorable to the appellee, together with all the inferences that justifiably could be drawn therefrom, fails to reveal sufficient evidence of probative value to take this issue to the jury."
>
> (269 F. 2d 805, 809).

Petitioners submit that the test of sufficiency as enunciated by the Supreme Court of Michigan (requiring any evidence, "however slight", to be submitted to the jury) should have been applied by the Court of Appeals in this case founded on diversity of citizenship.

Mr. Chief Justice Warren, in the recent case of *Dick vs. New York Life Ins. Co.*, 359 U. S. 437, observed a conflict in the various circuits as to whether the state test or federal test on sufficiency of evidence should be applied:

> "Lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement. Compare Rowe v. Pennsylvania Greyhound Lines, 231 F. 2d 922; Cooper v. Brown, 126 F. 2d 874; Lovas v. General Motors Corp., 212 F. 2d 805, with Davis Frozen Foods v. Norfolk Southern R. Co., 204 F. 2d 839; Reuter v. Eastern Air Lines, 226 F. 2d 443; Diederich v. American News Co., 128 F. 2d 144. And see Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 174, and 5 Moore's Federal Practice (2d ed. 1951) Sec. 38.10. But the question is not properly here for decision * * *. A decision as

to which standard should be applied can well be left to another case where the question is briefed and argued."

Dick vs. N. Y. Life Ins. Co., 359 U. S. 437, 444-5.

The Michigan rule is considerably different from the federal test on sufficiency of evidence, which was applied by the Court of Appeals in this case. In *Howard vs. Chrysler Corp.*, 275 Mich. 706, the court reaffirmed the following doctrine earlier laid down in *Conley vs. McDonald*, 40 Mich. 150, 158:

"'Where there is a total defect of evidence as to any essential fact, or a spark, the least particle, a scintilla as it is termed, the case should be withdrawn from the consideration of the jury. Where, however, the evidence introduced has a legal tendency to make out a proper case in all its parts, then, although it may in the opinion of the trial court or the appellate court be slight, inconclusive, and far from satisfactory, yet it should be submitted to the jury, whose proper province it is to consider and determine its tendency and weight.'"

Howard vs. Chrysler Corp., 275 Mich. 706, 710.

In *Slater vs. Walter*, 148 Mich. 650, the Michigan Supreme Court declared at pages 653-4:

"Where there is evidence, however slight, which should go to a jury, the question is one for the jury, and not the court, to determine."

To the same effect, see *Goldale vs. Portage Lake Bridge Co.*, 55 Mich. 413, 417:

"'It is only when there is an entire want of evidence upon some material point in the case that the court is warranted in taking the case from the jury."

See also *Davis vs. New York Central R. Co.*, 348 Mich. 262, and *Mynning vs. D. L. & R. R. Co.*, 64 Mich. 93.

The obvious conflict among the various Federal Circuit Courts as to whether the state or federal rule should control can only be resolved by the Supreme Court.

ISSUES OF FACT ON SPECIAL INTERROGATORIES

The District Trial Judge submitted to the jury the following special interrogatories:

> "Was the answer of defendant Erma F. Springer to the following question in her application for the policy true or false?
>
> " '6. During the past two years has any insurer cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household? ( ) Yes (x) No.'
>
> Answer True or False: TRUE.
>
> "Was the answer of defendant Erma F. Springer to the following question in her application for the policy true or false?
>
> " '7. During the past two years, has any automobile license, or permit to applicant or to any of his household to drive an automobile been suspended, revoked or refused? ( ) Yes (x) No.'
>
> Answer True or False: TRUE" (294a-295a).

In the face of these jury findings that the answers were true, the Circuit Court of Appeals erroneously substituted its judgment for that of the jury and determined that the answers to the questions on the application were "obviously false".

In so doing, the Court completely disregarded the testimony of Mr. and Mrs. Springer. Both testified they had not received written notice of cancellation of a prior insurance policy (49a, 225a). Mr. Springer stated he had "voluntarily * * * surrendered it" (102a-103a). No insurance company had refused the Springers automobile insurance. Mr. Springer simply had declined to accept a policy

offered by St. Paul-Mercury Insurance Company due to the high cost thereof (53a).

The holding of the Court of Appeals in contravention of this testimony was also contrary to the applicable rules of law.

> "There is a presumption that the notice of cancellation was received by Marvin, but like all presumptions it fades away in the light of the testimony of Marvin that he did not receive the notice of cancellation. In such a case, a question of fact is raised that should be determined by the trier of the facts. The trial court was in error in failing to submit this issue to the jury."
>
> *DeHaan vs. Marvin*, 331 Mich. 231, 241.

See also the case of *American Fidelity Co. vs. Ginsburg*, 187 Mich. 264, where the Michigan Supreme Court, in a similar situation, concluded at page 277:

> "This points in the finality to a transaction of surrender by mutual agreement rather than of arbitrary cancellation."

The Sixth Circuit Court of Appeals' decision in the case at bar is also in direct conflict with the Seventh Circuit Court of Appeals' decision, where that court held:

> "Where insured surrendered automobile liability policy pursuant to insurer's request for return of policy for cancellation, but no notice of cancellation was given in manner provided for in policy, which also permitted insured to cancel policy by surrender thereof, insured's surrender of policy *was not a cancellation by insurer*, and policy issued to insured by subsequent insurer was not void on ground that statement that insured had not had a policy cancelled by another insurer was a misrepresentation and concealment of matters material to the risk." (Italics ours).
>
> *General Accident Fire & Life Ins. Corp. vs. J. Ray Browne* (C. C. A. 7th 1954) 217 F. 2d 418.

The Court of Appeals failed to recognize and apply the well established Michigan law that questions and answers in an application for insurance must be construed liberally in favor of the insured and strictly against the insurer. *Hilburn vs. Citizens Mutual Auto. Ins.*, 339 Mich. 494; *Lintern vs. Zentz*, 327 Mich. 595.

The proof further showed that a prior 90-day suspension of Mr. Springer's driver's license occurred more than two years prior to Mrs. Springer's application for the Allstate Insurance (7a, 317a). It therefore was without the scope of that question in the application (317a). Mr. Springer testified that upon surrendering his Citizens' Mutual policy, he voluntarily surrendered his driver's license by mailing the same in to the Secretary of State (59a, 78a-79a). He did not again drive until his license was restored (228a).

Mrs. Springer, the insured, testified: "I did not answer any question falsely, absolutely not" (234a).

> "In considering the matter, we must necessarily have in mind the general rule that the proofs offered by plaintiff must be construed as strongly as possible in his favor. Thompson v. Michigan Cab Co., 279 Mich. 370; Grover v. Simons, 342 Mich. 480. The rule is applicable, notwithstanding that certain inconsistencies and contradictions may be deemed to exist in plaintiff's testimony. Yampolsky v. Smith, 320 Mich. 647."
>
> *Davis vs. N. Y. Central R. Co.*, 348 Mich. 262, 267.

The jury also found, in answer to a special interrogatory, that the policy of insurance involved herein had not been rescinded (294a). There is ample evidence to sustain this jury finding.

In its letter of December 20, 1955, addressed to the insured, Erma F. Springer, Allstate Insurance Company did not make clear by the language therein employed that the accompanying refund check could be cashed only on the understanding and condition that a rescission of the policy

was thereby effectuated. The letter in respect to the accompanying check merely stated:

> "Our check in the amount of $143.75, to cover full refund of premium paid by you since the original inception date of your policy, is enclosed" (326a).

In the case of *Puett vs. Walker*, 332 Mich. 117, the Michigan Supreme Court expressly held:

> "An accord and satisfaction results only where the act of the creditor in 'taking the check would be tortious, except on the assumption of a taking in full satisfaction.' * * *
>
> " 'If defendant honestly sought an accord and satisfaction, it could have and should have plainly advised plaintiff that acceptance of the $375.00 must be upon the express condition that it satisfied any claim for breach of the employment contract which plaintiff might otherwise assert.' "
>
> *Puett vs. Walker*, 332 Mich. 117, 125.

The Springers are unskilled laborers (63b, 40b) with only eighth and seventh grade educations respectively (63b, 40b). They could not be expected to understand this letter. The proof is undisputed that Mrs. Springer, the insured, never saw the check until it was produced in court the day of the trial of this case (240a). She had never read the letter (252a). Mr. Springer had opened the letter addressed to Mrs. Springer, had forged her signature to the check and cashed it about two days before Christmas (240a).

The Court of Appeals inferentially acknowledged there had been no meeting of the minds between Allstate Insurance Company and its insured, Erma Springer, but substituted its opinion for that of the jury and concluded, "There is no question under the evidence but that Murl Springer was authorized to handle the matter of insurance for his wife * * *." (269 F. 2d 805, 810). In fact, the record indicates that Mrs. Springer, herself, dealt with the insurance company, ordered the particular coverage desired (70a-71a) and paid for the insurance (85a). She also dealt directly

with the adjusters of Allstate Insurance Company (222a, 223a, 237a).

As stated by the Michigan Supreme Court in a recent decision:

> "As to (3), which alone we think states a sufficient reason for affirming the circuit judge's decision, it is apparent from this record that there never has been a meeting of minds between these litigants which resulted in an accord and satisfaction."
>
> *Puett vs. Walker*, 332 Mich. 117, 124.

See also *Phillips vs. Hirsch*, 292 Mich. 693.

The Michigan Supreme Court has also held:

> "Though an insurance policy may ordinarily be cancelled by surrender of the policy by the insured to the insurer and the acceptance of the unearned premium or cash surrender value thereof, surrender and cancellation of an insurance policy will not relieve the insurer from liability incurred prior to its surrender and cancellation."
>
> *Nash vs. N. Y. Life Ins. Co.*, 272 Mich. 680, 682.

A careful review of the record at bar demonstrates clearly that questions of fact for the jury were established on all three issues. The Court of Appeals' judgment in setting aside the jury verdict deprives petitioners of their constitutional right to trial by jury.

Mr. Justice Black, in speaking of the Appellate Court's concern to preserve trial by jury, observed in *Galloway vs. United States*, 319 U. S. 372, 407:

> "As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preser-

vation of this constitutional right even though each case necessarily turns on its peculiar circumstances."

Galloway vs. U. S., 319 U. S. 372, 407.

COUNSEL DID NOT COMPLY WITH RULE 51

Appellant's counsel failed to object to the special interrogatories submitted to the jury (289a-292a), even though specifically so requested by the court (292a). The record is undisputed that the only exception appellant's counsel made to the actual jury charge related solely to the matter of the insurance company being charged with the knowledge of its agent (289a).

Interpreting District Court Rule 51 in *Solorio vs. Atchinson, Topeka & Santa Fe R. Co.*, (C.C.A. 10) 224 F. 2d 544, 546, the court said:

> "It blueprints with meticulous care the juncture at which and the manner in which objections shall be made. * * * And in respect to manner or substance, it provides that the grounds of objection shall be stated distinctly."

Also see *Johnson vs. Chesapeake & Ohio Ry. Co.*, (C.C.A. 7) 227 F. 2d 858; *Hansen vs. St. Joseph Fuel Oil & Mfg. Co.*, (C.C.A. 8) 181 F. 2d 880, certiorari denied 340 U. S. 865.

Petitioners recognize that writs of certiorari are sparingly granted. However, failure to follow the Michigan law and the deprivation to petitioners of their rights to trial by jury are of extreme importance to the bench, bar and citizens of the State of Michigan, as well as the petitioners herein. Petitioners' rights to a trial by jury, as guaranteed by Amendment VII of the United States Constitution, have been denied. The Circuit Court of Appeals' decision violates the repeated rule laid down by this court, that "a court is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because the court regards another result as more reasonable.", *Tennant, Adm'x vs. Peoria, et al*, 321 U. S. 29. The recent holding of this court in *Dick vs. N. Y. Life Ins. Co.*, 359 U. S. 437, decided May 18, 1959, is positively controlling of the present action, this court having there stated:

"In our view, the Court of Appeals improperly reversed the judgment of the District Court. It committed its basic error in resolving a factual dispute in favor of respondent * * *. (p. 445).

"After all the evidence was in, the district judge, who was intimately concerned with the trial and who has a first-hand knowledge of the applicable state principles, believed that the case should go to the jury. Under all the circumstances, we believe that he was correct * * *: (p. 447).

Dick vs. N. Y. Life Ins. Co., 359 U. S. 437, 445, 447.

WHEREFORE, it is respectfully submitted that petitioners' prayer for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals should be granted.

Dated: November 6th, 1959.

FRED ROLAND ALLABEN,
408 Federal Square Building,
Grand Rapids 2, Michigan.
(Counsel of Record).

CRAIG E. DAVIDS,
408 Federal Square Building,
Grand Rapids 2, Michigan.
Attorneys for Petitioners, Clare Goodman, Forrest M. E. Johnson, Anna Gulch, Adm'x of the Estate of Stephen Stanley Gulch, Deceased, Dorothy E. Swartz, Adm'x of the Estate of Harold Swartz, Deceased.

HARRY D. REBER,
Fremont, Michigan.
Attorney for Petitioners, Erma F. Springer and Murl D. Springer.

RICHARD B. BAXTER,
216 Federal Square Building,
Grand Rapids 2, Michigan.
Attorney for Petitioner, Indiana Lumbermen's Mutual Insurance Company.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. 13,594

ALLSTATE INSURANCE COMPANY,

Appellant,

vs.

ERMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GULCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased; DOROTHY E. SWARTZ, Administratrix of the Estate of HAROLD SWARTZ, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Appellees.

(Decided August 28, 1959)

Appeal from the United States Court for the Western District of Michigan, Southern Division

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OPINION

Before: Simons and Miller, Circuit Judges, and Shelbourne, District Judge.

Miller, Circuit Judge. Appellant, Allstate Insurance Company, brought this declaratory judgment action seeking an adjudication that a policy of automobile liability insurance, issued by it to the appellee Erma F. Springer, was void from its inception for fraud and afforded no benefits or protection to the insured or to any of the appellees making claims thereunder. Following a trial by jury which

returned special verdicts, the appellant's contention was rejected by the District Court.

The insurance policy covered a Buick automobile which, prior to March 17, 1954, was owned by the appellee Murl D. Springer and who on or about that date transferred it to his wife, Erma F. Springer. On April 2, 1954, Erma Springer made written application to the appellant for liability insurance and the appellant issued to her the insurance policy in question covering the Buick automobile for a term of twelve calendar months ending April 3, 1955. At the expiration of that term the appellant issued a certificate extending the policy coverage for an additional period of one year until April 3, 1956.

On November 13, 1955, Murl Springer who, with the consent of his wife, was driving the insured automobile, collided with a Plymouth automobile owned and driven by Harold Swartz. Swartz and Stephen Gulch, a passenger in his car, died as a result of injuries received in the accident. Two other occupants of the Swartz car, appellees Clare Goodman and Forrest M. E. Johnson, were injured.

Appellant contends that the insurance policy covering the Buick automobile, and the extension thereof, were null and void because of false and fraudulent statements made by Erma Springer in her answers to questions Nos. 6 and 7 in her application for the policy. These questions read as follows:

> "6. During the past two years, has any insurer cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household?
>
> "7. During the past two years, has any automobile license, or permit to applicant or to any of his household to drive an automobile been suspended, revoked or refused?"

After each question was a square followed by the word "yes" and a second square followed by the word "no" for use in indicating the answers. In each instance checks were inserted in the squares marked "no." The applica-

tion contained the following statement, "I hereby declare the facts stated herein to be true and request the Company to issue the insurance, and any renewals thereof, in reliance thereon." The application was signed by Erma F. Springer, although it is admitted that she herself did not fill in the answers to questions 6 and 7. Appellant's evidence was that the check marks in the "no" squares were made by appellant's agent at the time the application was made out, in accordance with statements made by Erma Springer.

The following facts have an important bearing upon questions 6 and 7 and the answers thereto. On October 5, 1951, Murl D. Springer was arrested on a charge of driving while under the influence of intoxicating liquor, to which he pleaded guilty. His driver's license was revoked for a period of ninety days, and he became subject to the provisions of the Michigan Financial Responsibility Act for a period of three years. At that time he owned a 1949 Chevrolet automobile. In order to obtain the restoration of his driver's license, he made application to Citizens' Mutual Automobile Insurance Company for a policy conforming to the requirements of the Financial Responsibility Act. The policy was issued and the Secretary of State issued to Springer a restricted driver's license, authorizing him to operate only the Chevrolet automobile. During the early part of 1953 Springer replaced the Chevrolet automobile with a 1952 Buick and Citizens' Mutual issued a policy covering the Buick automobile, effective until December 14, 1953. A corrected limited license was issued to Springer to operate only the Buick. On December 14, 1953, the coverage was made effective until December 14, 1954. Between October 10, 1952, and December 24, 1953, Murl Springer was involved in three traffic violations. On November 14, 1953, he was involved in a wreck and pleaded guilty to a charge of not having his car under control. On February 2, 1954, Citizens' Mutual served Springer by mail with a notice of cancellation of his policy, effective February 16, 1954. Springer was also notified by telephone by his insurance agent of the cancellation, and was requested to bring in his policy. He delivered the policy to the agent and received a check for the premium refund.

The agent told him that the cancellation was on account of the wreck.

Under the Michigan Financial Responsibility Act, Springer was not permitted to drive the Buick automobile unless it was covered by insurance. Springer, acting through his insurance agent, signed two applications for insurance under the Assigned Risk Plan. The premium for such insurance was larger than it would have been if he had not been under the Financial Responsibility Act, and Springer decided not to take such a policy. After the expiration of the thirty days allowed for the purpose of obtaining insurance his driver's license was taken up by the Office of the Secretary of State on March 17, 1954. On the same day Springer transferred title of the Buick automobile to his wife, Erma Springer, without consideration therefor. Thereafter, Springer requested the appellant to have one of its agents call at the Springer residence to discuss insurance for the Buick automobile and agent Baker went there on April 2, 1954, for that purpose, at which time the application in question was made by Erma Springer, upon the basis of which the policy was issued.

Appellant's investigation of the accident caused it to also investigate Murl Springer's driving record. By letter of November 16, 1955, it notified Erma Springer that its investigation of the accident and any actions with respect thereto on its part were being done under a reservation of rights because of the incorrect answers in the application for insurance. Under date of December 20, 1955, the appellant notified Erma Springer by letter that it was declaring the policy void from the date of its inception. This letter closed with this statement, "Our check in the amount of $143.75, to cover full refund of premium paid by you since the original inception date of your policy, is enclosed." This letter was received at the Springer residence. Murl Springer endorsed Erma Springer's name and his own name on the back of the check which he thereafter cashed. He used the money, with his wife's knowledge, to buy Christmas presents. Erma Springer testified that her husband endorsed her name on the check and cashed it with her full consent.

The District Judge overruled appellant's motion for a directed verdict and submitted the case to the jury for answers to written interrogatories. Following the verdict, appellant moved for judgment notwithstanding the verdict and in the alternative for a new trial. The District Judge called attention to the fact that a motion for judgment notwithstanding the verdict is not expressly recognized in the Rules of Civil Procedure, but properly treated it as a motion under Rule 50 (b), Rules of Civil Procedure, and denied it. *Cone v. West Virginia Paper Co.*, 330 U. S. 212, 215; *Shaw v. Hines Lumber Co.*, 249 F. (2) 434, 437, C. A. 7th; *Moore v. Capital Transit Co.*, 226 F. (2) 57, note 1, p. 58, C. A. D. C., cert. denied, 350 U. S. 966. He also overruled the motion for a new trial. The general rule that the overruling of a motion for a new trial is not reviewable except for abuse of discretion is not applicable where the error involved is one of law. *Reisberg v. Walters*, 111 F. (2) 595, C. A. 6th; *General American Life Ins. Co. v. Central National Bank*, 136 F. (2) 821, 823, C. A. 6th; *Legler v. Kennington-Saenger Theatres*, 172 F. (2) 982, 984, C. A. 5th; *Astles v. Quaker City Bus Co.*, 158 F. (2) 979, 980, C. A. 2nd. Accordingly, even though appellant may not have been entitled to a directed verdict, our present review will include errors of law, if any, in submitting the case to the jury.

Two of the interrogatories asked the jury if the answers of Erma Springer to questions 6 and 7 in the application were true or false. The jury found that the answer to each question was "true." The judgment holding the insurance policy valid from its inception was based upon these findings.

In support of the action of the District Judge, appellees refer to the testimony of Erma and Murl Springer that they truthfully answered all questions asked of them by appellant's soliciting agent; that the soliciting agent did not ask them questions numbered 6 and 7; that the soliciting agent, or some other representative of the appellant at a later time, filled in the answers to questions 6 and 7 in the application; and that they did not know that such answers had been made in the application when it was signed by Mrs. Springer. They contend that this evidence

raised a factual issue about the answers to questions 6 and 7 and sufficiently supported the two findings of the jury on those issues. *Hughes v. John Hancock Life Insurance Co.*, 351 Mich. 302, 306, 312.

We are of the opinion that the evidence was sufficient to take to the jury such questions as whether the soliciting agent asked Erma and Murl Springer questions 6 and 7 and whether they answered them as indicated by the check marks on the application. *Cebulak v. Lewis*, 320 Mich. 710. But those are not the questions which were submitted to the jury. The questions submitted to the jury were whether the negative answers shown by the signed application were true or false. The evidence is uncontradicted and conclusive that the negative answers were false and that Erma Springer signed the application. Whether, under all the circumstances surrounding the signing of the application, she was bound by the questions and answers thereto, is an entirely different question. Questions 6 and 7 should not have been submitted to the jury. *Lovas v. General Motors Corp.*, 212 F. (2) 805, 807-808, C. A. 6th; *Wilson v. Goscinske*, 233 F. (2) 759, 762, C. A. 6th; *Manos v. Detroit United Railway*, 168 Mich. 155, 162; *Merritt v. Huron Motor Sales, Inc.*, 282 Mich. 322, 326. The jury's answers to questions 6 and 7, as drafted, must be set aside, and the judgment based upon them necessarily falls.

Another interrogatory submitted to the jury asked the jury if Erma Springer, by accepting and cashing the appellant's check for $143.75 as a refund of premium in accordance with its letter of December 20, 1955, understood that the appellant was declaring the policy void and did she intend at that time to acquiesce in and consent to the appellant's rescission and avoidance of the policy. The jury answered this question "no." We are of the opinion that a review of the evidence in the light most favorable to the appellee, together with all the inferences that justifiably could be drawn therefrom, fails to reveal sufficient evidence of probative value to take this issue to the jury.

We recognize the Michigan rule that to constitute an accord and satisfaction, the tender of payment as being in full should be made in unequivocal terms so that the credi-

tor in accepting the payment will do so understandingly. *Durkin v. Everhot Heater Co.*, 266 Mich. 508, 513. In our opinion, the written exhibits and the unequivocal admissions of Erma Springer conclusively show that she fully understood the purpose of the tendered check and its effect, if accepted, upon the policy of insurance. The appellant's letter of December 20, 1955, reads as follows:

"Mrs. Erma Springer
2512 Reynolds Street
Muskegon Heights, Michigan

Dear Mrs. Springer:

The Allstate Insurance Company does hereby declare void from the date of its inception the policy numbered 6313346-4,3, issued to you.

Please take notice that the voidance of this policy leaves you without insurance protection by our company with reference to the accident in which your car was involved, while being driven by your husband, Murl Springer, occurring on November 13, 1955, at the intersections of Routes M-20 and M-37 in White Cloud, Michigan. Therefore, the said company hereby disclaims and denies to you and to others, any and all liability or obligation under such policy, relative to the said accident or otherwise.

We have declared such policy to be void because our investigation has revealed the following: 1) During the two years preceding April 3, 1954, an insurer cancelled automobile insurance issued to your husband, Murl Springer, a member of your household; 2) During the two years preceding April 3, 1954, the driver's license of your husband, Murl Springer, a member of your household, was under suspension, and 3) for other reasons.

The Allstate Insurance Company will take no further action with respect to any claim which you may have against it or with respect to any claim or suit against you which has arisen, or which may arise out of the said accident, and hereby withdraws from the matter entirely.

> Our check in the amount of $143.75, to cover full refund of premium paid by you since the original inception date of your policy, is enclosed."

The appellant in its letter of November 16, 1955, to Erma Springer, in which it made a reservation of rights in its investigation of the accident, contained this statement:

> "We are making this reservation of rights because of breach of declarations relating to prior auto insurance cancellation or refusals to you or any member of your household and breach of declarations relating to prior drivers license revocations suspensions etc., and for other reasons."

Erma Springer testified that she read enough of the letter to know that the company had cancelled the policy and that she was not insured at the time of the accident. The following is quoted from her testimony:

> "Q. What did you tell him at that time?
> "A. I said: 'Why, Mr. Marks, are you trying to tell me that I am not insured, after having this policy for nearly two years, paying for it on two different occasions, and now you are finally going to drop us?' He said, 'That's it, that's it.' I said: 'I can't understand it.' I said: 'When we need you so bad now, there has two people been killed, and — .'"

There is no question under the evidence but that Murl Springer was authorized to handle the matter of insurance for his wife and to endorse and cash checks drawn to her order. In addition to other testimony, the District Judge asked her the following questions, to which she made the following answers: "Witness, I don't want any uncertainty about this question: Your husband endorsed your name on this check, and you claim he cashed it with your full consent? A. Yes, sir. The Court: And everything he did in connection with this insurance was done with your consent, was it? A. Yes." Erma Springer also knew that her husband used the proceeds of the check to

buy Christmas presents and made no objection thereto.

Although we think this question was improperly submitted to the jury and that the jury's finding in answer thereto must be set aside, we do not at this time rule on the legal effect of this offer and acceptance. A policy of insurance is a contract between the insurer and the insured and, like other contracts, may be cancelled by mutual agreement, in the absence of intervening rights. *Aetna Life Ins. Co. v. Dodd*, 103 F. (2) 793, 795, C. A. 8th, cert. denied, 308 U. S. 573, rehearing denied, 308 U. S. 634, 637; *New Zealand Insurance Co. v. Larson Lumber Co.*, 13 F. (2) 374, 375, C. A. 7th; *Denler & Denler Land Co. v. Eby*, 277 Mich. 360, 364.

What effect an attempted retroactive cancellation by the parties has upon possible intervening non-consenting beneficiaries under the policy, who may have acquired rights by reason of an accident covered by the policy and the policy provisions with respect thereto, is a question which arises under our ruling on this aspect of the case and which has not had the consideration of the District Judge. See cases cited in *Corpus Juris Secundum, Insurance, Sections 459 and 588*, and *Contracts, Section 390*.

The judgment is reversed and the case remanded to the District Court for a new trial in accordance with the views expressed herein.